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Bangladesh in 2015: Challenges of the *iccher ghuri* for learning to live together.

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This article builds on earlier theoretical and development-related work about the practical relevance of legal pluralist theorising, a field of comparative law in which there is presently much and quite significant progress.[2] *It presents law as an increasingly interdisciplinary and highly dynamic field, which therefore needs to be analysed by plurality-conscious methodologies rather than traditional monist, state-centric perspectives to find 'the right law' and to explore possible options for any particular scenario. The main part, in several sub-sections, applies such analytical efforts to continuing struggles over the fine-tuning of basic law-related development visions for Bangladesh. It examines how the four major elements of the iccher ghuri vision of Bangladesh, the nation's wish kite, namely nationalism, democracy, socialism and secularism, are not only interconnected, but all present continuing complex challenges. The article demonstrates the analytical and practical usefulness of pluralist theoretical perspectives. Built on respect for the various differences and hybridities that characterise the nation of Bangladesh, their highly competitive legal actors, and various kinds of interconnected ambitions, this method can help all concerned to understand better to what extent and why the four major elements of the iccher ghuri have not been secured by now. In view of continuing troubles, the unfortunate foregone conclusion is that all four elements of the national vision remain contested. As this contestation often involves brutal force, rather than constructive discussion and democratic methods, the result is that the nation as a whole does not prosper as much as it might do otherwise. The concluding message is, therefore, that more efforts need to be made by Bangladeshis to learn to live together in a spirit of constructive engagement to facilitate mature national growth.*

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2 Brian Z. Tamanaha, Caroline Sage and Michael Woolcock, *Legal pluralism and development. Scholars and practitioners in dialogue* (Cambridge: Cambridge University Press, 2012) the first major law-focused study that connects legal pluralism theorising constructively to development literature.

Introduction

At 44 years, a normally developed person is supposed to be mature, maybe at the peak of creativity, perhaps just a few years away from a potential midlife crisis, but certainly no longer immature and unsure of his or her visions and aims. As much as for an individual, for a state personality, too, these kinds of developmental expectations may not work out, either. Something may be wrong with the genetic structure, or there are too many competing pushes and pulls, with the potential or actual effect that healthy development is held back. Efforts to divide a nation and turn its people against each other may be identified and need to be addressed. Apart from risking serious harm and much trouble for individuals living in such a state, confusions over visions and the direction of development result in negative impacts on the identity construction of the nation as a whole. If, as we know, individuals may be confused and torn, despite reaching a certain age and physical maturity, the same can be said about states. If a troubled individual may ultimately commit suicide, a troubled nation may erupt in self-destructive violence, creating a climate of fear, mistrust and confusion over visions for the future.

I am convinced that Bangladesh as a nation has a very healthy gene pool and am by no means negative or pessimistic about the country and/or its development. It is not a poor country anymore, on many counts. However, since Bangladesh remains manifestly confused over its identity and hence is deeply troubled in many ways, the main purpose of the present article is to assess various aspects of maturity in the nation-building processes in Bangladesh. The analysis seeks to identify the scope for removing blockages and turbulences that seem to still trouble the country and its development despite more than four decades of self-rule and formal independence.

Having worked for many years on Muslim law in South Asia and also specifically on Bangladeshi law, I have been to Dhaka and other places in Bangladesh many times and have also written about Bangladeshi laws.[3] My experience suggests that

3 Werner Menski and Tahmina Rahman, 'Hindus and the law in Bangladesh', *South Asia Research*, 8(2) (1988),: 111-131; David Pearl and Werner Menski, *Muslim family law*, (London: Sweet and Maxwell,1998). More recently, see Werner Menski 'Flying kites. Managing family laws and gender issues in Bangladesh', *Stamford Journal of Law*, 2 (2011): 109-134. Most recently in February 2015, I chaired a Researcher Link Workshop, arranged by the British Council, which sought to assess the wide theme of 'Governance and Management of Gender Relations: A Comparative Study of Law and Society'. We began that Workshop, held in memory and honour of BRAC Chief Engineer Abul Monsoor, with a power point presentation that offered a comparative legal framework for the analysis of Bangladeshi legal development.

while the vision of Bangladesh is sound and strong, significant problems of implementation remain because of lingering confusions among the people and their leaders over key concepts, as well as petty abuses of power. Basically, there are too many narrow-minded and selfishly competing pushes and pulls, including much corruption. Bangladeshis are evidently hardworking people, but always concerned that disaster may strike any moment, which creates what Pièrre Legrand and others would call a certain *mentalité*, reflected also in the locally applicable laws.[4]

Concern for the higher national interest is of course never only based on formal legal structures. It remains far too often sidelined by selfish, narrow and reductionist agenda and actions, which continue to generate much mindless violence and destruction. Focusing here on the vision of Bangladesh as an independent nation state and its dreams and hopes for a better future, as indicated, the main purpose is to examine through legal pluralist methodology what problems remain in fulfilling those ambitious aspirations. Before we can assess the four major elements of the Bangladeshi national vision, one by one, we need to acknowledge at once that they are in fact connected in many ways, and that the climate within which we operate is no longer the same as in 1971. Next now, a few more explanations are needed for readers about pluralist legal theorising, the application of the kite model of law and recent progress in understanding its implications.

Progress in pluralist legal theorising

The theme for the initial powerpoint presentation in the British Council Workshop ('Does the *iccher ghuri* have a gender?') was based on the kite model of legal pluralist analysis that I have been developing over the past two decades or so, together with a team of researchers, including several Bangladeshis and other South Asians.[5] The approach has been strengthened by, and has in turn influenced,

4 See on this theme very insightfully James J. Novak, *Bangladesh. Reflections on the water* (Dhaka: The University Press Ltd,1994)

5 Most recently, the kite model was tested in the as yet unpublished doctoral thesis of Sonia Z. Khan, "Democratic transition and the Caretaker Government in Bangladesh: A culture of mistrust"(PhD diss., London: SOAS, 2015)

significant advances in global theorising of legal pluralism.[6] The still evolving kite model of law has by now reached a mature stage of theorising, discussed further below.[7] We also find that it works remarkably well in all kinds of applied scenarios, including the Bangladeshi-dominated environment of the Borough of Tower Hamlets in East London[8], as well as judicial training initiatives in several countries. The model has over the past decade turned from a triangular structure,[9] based on a Japanese prototype emphasising the interaction of official law and unofficial law with various forms of ethics and values,[10] into a significantly revised image with four corners. This notable change occurred because I was ultimately persuaded that in this day and age, human rights and international law cannot really be left out of any globally relevant model of law. Comprehensive development-focused legal analysis is supposed to reflect the lived realities of ensuing disputes and tensions that impact on people's daily lives as individuals, members of social groups, citizens or residents in nation states, or as global citizens. As all levels are visibly and invisibly interconnected, researchers and commentators need to remember those macro-level connections even while they focus on micro-analysis – a huge challenge. Being aware of the kite image helps, as the four corners of this flimsy structure are

6 See in particular Werner Menski, 'The liquidity of law as a challenge to global theorising'. *Jura Gentium*, Vol. XI: *Pluralismo Giuridico*. Annuale 2014 (2014): 19-42; Werner Menski. 'Remembering and applying legal pluralism: Law as kite flying' in *Concepts of law: Comparative, jurisprudential, and social science perspectives*, edited by Séan Patrick Donlan and Lukas Heckendorn Urscheler, (Farnham: Ashgate, 2014), 91-108; and Werner Menski. 'Relative authority in a new age of chaos'. In Roger *Authority in transnational legal theory: Theorising across disciplines. Dedicated to the memory of Professor Patrick Glenn*, edited by Roger Cotterrell and Maksymilian Del Mar (Cheltenham: Edward Elgar, 2015), forthcoming.

7 For the earlier stage of theorising in relation to Bangladesh, see (Menski 2011), see note 3 above.

8 In fact it works so effectively there in supporting the affirmative action visions of the local authority team that activist interventions have brought about significant changes for ethnic minority residents. The deeply political nature of such interventions is obvious, and indeed this has now led to the removal of the Bangladeshi Executive Mayor of Tower Hamlets, officially because of alleged malpractices in relation to elections and fund allocations. A rather different assessment may be that the impact of these affirmative action programmes has been so effective that this removal action can be seen as a form of 'establishment backlash', or efforts to reclaim white supremacy, in a scenario where pluralising demographic developments speak their own language now and consequent action is required to protect what is ubiquitously traded as 'rule of law'.

9 For illustrations, see (Menski 2006, 185-189 and 612), as note 1 above, and (Menski 2011,114-117) as note 3 above.

10 This comes from Masaji Chiba, *Asian indigenous law in interaction with received law* (London and New York: KPI, 1986) and with regard to 'identity postulate specifically, Masaji Chiba, *Legal pluralism: Towards a general theory through Japanese legal culture* (Tokyo: Tokai University Press, 1989).

clearly always connected. In view of wise warnings by Professor William Twining,[11] I was concerned that this four-cornered model structure should not be treated or perceived as a static or rigid square or a kind of 'black box'. For law is everywhere highly dynamic, a living entity, subject to many competing pushes and pulls, and always moving, indeed like a kite in the sky, or maybe an octopus in water.[12]

While this macro-level theoretical model of the kite seems to apply and work everywhere, it clearly takes culture-specific forms in Bangladesh. I was fascinated to discover during an extended journey in Bangladesh, that the image of the *iccher ghuri,* the wish kite, is not just an attractive piece from a romantic film song, but can easily be transferred to the national dreams of a bright future for the whole country. Intriguingly, this image is closely connected to the notion of a journey or a path, which then seamlessly becomes a widely known Islamic concept, nothing else but *shari'a*, or also its local Bangla association with *dharma.*[13] The basic rationale of this wish kite in relation to the four key elements of Bangladesh's national vision is easily made clear. Corner 1 at the top, the realm of ethics, values, identity and psychology, refers to the internal pluralities of people's belief systems and values. It thus relates most closely to the vision of secularism, but also has important connections to nationalism. Corner 2 on the right hand side concerns social normativities, including customs and various local traditions, the fields of sociology and anthropology as much as socio-economic concerns. It thus fits, above all, the vision of socialism and the envisaged methods of distribution of social and material resources. Corner 3 on the left hand side concerns the state and its laws, and thus also politics. From a legal positivist perspective, this is the 'proper' legal corner, but its management is supposed to be based on power sharing and negotiation within the wider political arena. Thus it accounts for and relates mainly to the national vision relating to democracy. Finally, at the bottom we have corner 4, the vast, internally

11 W. Twining, *Globalisation and legal theory* (London: Butterworths,2000)

12 Lecturing about this model in many parts of the world, I discovered various culture-specific meanings of kite-flying and its relation to navigation, in particular. See now Werner Menski, 'Legal simulation: Law as a navigation tool for decision-making'. In *Report of Japan Coast Guard Academy*, 59(2.1) (2014): 1-22. Available at: http://harp.lib.hiroshima-u.ac.jp/jcga/metadata/12172?l=en. Intriguingly, the Japanese word for kite (*tako*) is the same as the sign for octopus, a living entity moving in water.

13 The *iccher ghuri* image comes from a romantic song composed by Fuad featuring Topu in 'Yaatri' from the music album 'Bondhu bhabo ki?' but can easily be transferred to nationalistic dreams of a bright future for the country. It can be accessed at https://www.youtube.com/watch?v=BlB-8bpNmAg.

plural realm of international law and human rights norms and processes, and thus international relations.

The element of the national vision that would appear to match this corner of the *iccher ghuri* best is actually nationalism, the assertion that the nation of Bangladesh should have the right to speak with its own voice. As already indicated, however, this is closely connected to issues of identity in corner 1.

That said, advanced global theorising of the kite methodology now suggests several important additions of deep relevance for the Bangladesh scenario. Firstly, legal pluralism is not merely a combination of four interconnected elements as outlined above. We are not just comparing apples and oranges, as some critical observers have interjected, but are dealing with law as a basket of fruits, maybe even a fruit salad in which the individual elements are still present as part of a larger whole.[14] Deep legal pluralism is therefore much more than a simple 1-2-3-4 addition.[15] Notably, we need to be aware that all of four corners of the kite are already partly composed of elements of the other corners; in addition they all influence each other. For example, the state law of Bangladesh is not only composed of rules and processes made by the state, but contains building blocks that come from religious norms, dominantly of course Islam, but also the minority religions and colonial heritage, whether Christian or secular. The state laws of Bangladesh are also composed of or influenced by local cultural norms and customs, and are these days increasingly guided – or put under stress and pressure - by various competing understandings of human rights and international law. Since a similar analysis of the plurality within each kite corner can be undertaken for all the other elements, this has led me to suggest that 'law' in lived reality is everywhere a plurality of pluralities (POP), which clearly cannot be analysed appropriately by monist perspectives and methodologies.[16]

Secondly, in processes of making decisions about law and applying the available tools in the shape of rules, processes and values/ethics, legal actors pick up such tools from around the kite structure but often appear to do so in particular sequences, depending on who or what they are. In judicial training seminars, thus, it takes judges who may never have heard before of the kite methodology a few minutes to realise that as agents of the state, they are expected to start their decision-making processes from a position located within corner 3 and with the tools available to them within that corner. For a member of a body known as *shalish* in Bangladesh, this would not be so clear-cut, as that legal actor would perceive himself first of all as a member of the local society or community, or maybe even as a religiously inspired individual or spokesperson. Similarly, for a *mufti* issuing a *fatwa* or advising someone, the starting point is more often than not within the realm of corner 1.

Two important consequences arise from this practice-focused understanding of the methodologies of sequencing in decision-making processes. No matter how much any decision making agents perceive themselves as rooted in one specific corner of the kite, and may seek to speak with authority from that specific corner, such an agent cannot avoid the responsibility to consider also and account for the presence of the other elements of the kite structure. It may be only to dismiss them as allegedly or actually irrelevant or least important, but such an agent has to engage even with what is hated and is not liked. We shall see below that this is quite crucial, especially in the adversarial political scenario of Bangladesh. Otherwise there is actually an act of violence involved, generating feelings and perceptions that a particular voice was not considered or taken account of. In practice, then, to recapitulate, any decision-making process is necessarily plural in its basic structure and is normally structured in such a way that what is hated most, or what is least liked, is actually picked up and considered last, often with considerable disgust and reluctance. In the simple language of the kite image, this means that cutting out any one of the four corners of the kite leads inevitably to a crash scenario for the whole structure. It is simply not sustainable.

The second important consequence of accounting for the internal plurality of decision-making processes is the realisation that we need to do further solid work now on establishing sound sustainability tests for such decision-making processes. Every single corner of the kite, applied in isolation or without due consideration of balance, risks the creation of harm. No element of law, certainly not even state law itself, can be completely trusted to be just 'good law'. For, as is universally known, decision-making is a form of exercise of power. Such powers, however, are

14 This follows clearly from (Donlan and Urscheler 2014), see note 6 above.

15 This was already evident from (Menski 2006, 612), note 1 above and also (Menski 2011, 114-117) note 9 above.

16 See in detail (Menski 2014), note 3 above.

inherently dangerous, as they can all too easily be abused and misused. We may think about lack of accountability, or simply dictating certain agenda and riding roughshod over the voices of others. Military rule tends to be perceived as such a form of abuse of power, though this may not always be the right conclusion. Any monist approach to claiming authority to make decisions, then, risks generating further problems, which I tend to view now as turbulences in the journey of a kite.

We are at this moment not yet able to provide comprehensive tests of sustainability for all possible scenarios, but certain patterns are emerging from existing research which shows us the way for making progress in this particular direction. To start with, a major sociological scholar who was until recently ignored by lawyers and not directly involved in pluralist analysis has firmly established through his life's work what we all vaguely know, namely that faulty application of laws and processes can result in discrimination.[17] In the specific terminology of this experienced scholar and his truly fascinating work, the result is the creation not of a Marxist 'proletariat', but of what he calls a 'precariat', an endangered class of people systematically disadvantaged by the operation of a specific rule system or a set of processes, or the impact of particular value systems. Professor Wacquant hence draws attention to the lurking legal harm of 'precariousness' resulting from certain legal actions. Evidently, this critical approach is of deep relevance for Bangladeshi discourses about the visions of the nation.

Other authors have begun to test the limits of tolerance when it comes to ascertaining the boundaries of pluralist navigation. Without analysing this intriguing finding, Professor William Twining established as a major result from his intense conversations with four leading human rights activists that they were all scared and deeply concerned about ending up 'tolerating the intolerable'.[18] This conclusion establishes a kind of human rights test, focused at corner 4 of the kite structure. But what is 'intolerable' to some may be simply disagreeable or disgusting to others.[19]

17 The most recent reference here is to Loïc Wacquant, 'Marginality, ethnicity and penalty in the neo-liberal city: An analytic cartography', *Ethnic and Racial Studies*, 37(10) (2014): 1687-1711, which contains important pointers to this author's earlier work and related studies.

18 William. Twinning, *Human rights, Southern voices* (Cambridge: Cambridge University Press, 2009), 218.

19 Tests I am working on here with a number of young scholars at the moment refer to assessments of what is considered *haram* in terms of Islamic law, clearly in some cases a matter of much *ikhtilaf*, or tolerated diversity of opinion, the most prominent Islamic form of internal pluralism.

Perhaps such assertions are merely a devious device to forcefully assert one's own authority and position and/or to claim one's own moral or other kind of superiority. Bangladeshis have the long spectacle of the 'Battle of the Begums' as a prime example of how such a contest of alleged intolerabilities may hold an entire nation to ransom, playing havoc with democracy and constantly risking that the kite of law crashes and the nation slips into turmoil. Other tests would appear to be directed at testing whether something is 'sociable' and passes a 'sociability test',[20] or whether a particular action, process or view is authentic in terms of some religious or moral doctrine. Lawyers, of course, are deeply familiar with the test of whether something is actually 'legal' and passes the hurdle of legality assessments.

While there is much progress currently in global legal theorising, I have earlier been critical of law teaching in Bangladesh and other parts of South Asia. It remains almost everywhere deficient because it gives too much importance to state-centric rule making and offers too little attention to processes of operating those rules and to the underlying value systems that influence such processes of generating and managing rules.[21] Unfortunately, also in 2015 such criticism still needs to be directed at most law teaching all over the world, though engagement with legal pluralism and its interdisciplinary methodologies is gaining some strength here and there, notably now in South Africa and again in Italy. Anywhere in the world, it is certainly not sufficient to merely go down the now fashionable route of transnational law teaching and to be only concerned with conflicts of state laws with international law and related human rights principles. To reiterate, all four corners of the kite have to be coordinated together all the time, which is indeed a massive challenge, wherever we go in the world.

But then, law is clearly everywhere culture-specific, and we do know about the crucial role of the concept of 'identity postulate',[22] also in relation to the partly pluralising effects of legal transplants, more so in different parts of Asia.[23] Closely related,

20 This seems to motivate the conceptual framework of (Cotterrell and del Mar 2015), see note 6 above.

21 (Menski 2011, 111), as note 3 above. See also Werner Menski, 'Flying kites in a global sky: New models of jurisprudence'. *Socio-Legal Review* (Bangalore) 7 (2011): 1-22.

22 See (Chiba1989), see note 10 above.

23 See Alan Watson, *Legal transplants. An approach to comparative law.* (Edinburgh: Scottish Academic Press, 1974). Alan Watson, *Legal transplants. An approach to comparative law* (Athens, GA: University of Georgia Press, 1993). Critical comments are found in Pierre Legrand, 'The impos-

the message coming from specialist scholars of globalisation is pretty clear-cut in this regard, too.[24] One rather prominent effect of globalisation has been the impact of the local on the global. This means in the lived reality of sustainable global diversity in law that 'there are a number of globalizations going on'.[25] The result is that the overall effect is not globalisation as world domination of any one legal tradition, but the pluralising, but still rather less well known phenomenon of 'glocalisation', a phenomenon that is also of utmost relevance to directing Bangladesh's *iccher ghuri*. For analysts have forgotten to remember that the Bangladeshi wish kite flies today in quite different times and conditions than in 1971. It is not merely a non-Pakistani kite, or a general global Islamic kite, or something pretending to be a modern Western kite, but it is indeed a colourful culture-specific *Banglar ghuri*. So the lawyers of Bangladesh, whether as judges, advocates or law teachers and their students, have their work cut out as socio-legal scholars.

Other law-related actors, whether we think of civil society activists, NGO staff, and the general public, everyone has a role in this navigational journey, in seeking to identify and finetune the nation's vision. It is completely unsurprising that there should be major disagreements. But the methods and nature of handling the tensions and conflicts remain unfortunately seriously marred by much patriarchal power-play in which two leading ladies call the top shots, and by much remarkable selective blindness when it comes to assessing the deep pluralities involved in the legal structures and law-related visions of Bangladesh.

Learning to live together: The four elements of the *iccher ghuri*

To reiterate, the four key elements of the vision for a golden successful Bangladesh relate to and focus on nationalism, democracy, socialism and secularism. They were written into the Constitution in 1972 under the guidance of the Awami League,

sibility of "legal transplants", *Maastricht Journal of European and Comparative Law*, 4 (1997): 111-124. See also David Nelken and Johannes Feest, *Adapting legal cultures* (Oxford and Portland, OR: Hart, 2001); The new *Asian Journal of Law and Society* (ISSN 2052-9015) has since 2014 quickly established itself as a leading forum for such debates.

24 See Robbie Robertson, *The three waves of globalization. A history of a developing global consciousness* (Nova Scotia and London: Fernwood Publishing and Zed Books, 2003).

25 See on this H. Patrick Glenn, *The legal traditions of the world. Sustainable diversity in law* (Oxford: Oxford University Press, 2007), 49.

and have recently been reiterated by the same party in ways that have led some experienced observers to compose fiercely critical writing.[26] A major task in the remaining sections below is to assess such recent critical writing by Bangladeshi lawyers from a pluralist perspective. Are such commentators like frogs in a well, not able to see the wider perspectives and the changing, pluralist dimensions of how their country develops?

I have explained earlier how the four key elements of the vision may be seen and treated in relation to the four major corners of the kite. The sequence in which they are going to be analysed below does not follow the numbering of the kite corners as it presently exists. Instead it is informed by the sequence in which they appear in the Constitution. As we begin with nationalism, it appears that the discussion also follows a roughly historical development, starting with the independence of Bangladesh in 1971. However, as indicated, all elements are interrelated and none of the four ambitions or agenda can be signed off as completed or fully achieved.. Moreover, new irritations and major turbulences constantly appear, and I apologise in advance for some inevitable overlaps, confusions and mistakes of assessment that will arise in discussing the messy scenarios we seem to find before us.

Nationalism as an element mainly of corner 4 of the *iccher ghuri*

It is evident that the blood-stained birth of the country in 1971 following a virtual war of independence from Pakistan continues to have huge implications today for the kite journey of Bangladesh. Specifically the un-redressed war crimes committed at that time, and the current government's efforts to make some progress in this regard have led to violent recent reprisals against certain sections of the minority communities, which reportedly brought back memories of what went on in 1971. This has made it clear that perhaps still not everyone agrees that Bangladesh actually has a right to exist as an independent nation, but also confirms grave problems over the other three elements of the *iccher ghuri* of Bangladesh. Moreover, issues related to nationalism are not exclusively located in one kite corner, anyway.

26 I shall take up and discuss in particular Maimul Ahsan Khan, 'Constitutional disaster and "legal impunity": Constitutional amendments in perspectives', *Counsel Law Journal*, 2(1) (2014): 30-82 and Md. Abdul Halim, 'The Fifteenth Amendment to the Constitution: Concerns and perils of constitutionalism in Bangladesh', *Counsel Law Journal*, 2(1) (2014):83-136.